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FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1227

RIN 2590-AA60

Suspended Counterparty Program

AGENCY: Federal Housing Finance Agency.

ACTION: Interim final rule with request for comments.

SUMMARY: The Federal Housing Finance Agency (FHFA) is issuing an interim final rule with request for comments that generally codifies the procedures FHFA follows under its existing Suspended Counterparty Program, established in June, 2012. The interim final rule requires the Federal National Mortgage Association (Fannie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac), and the twelve Federal Home Loan Banks (Banks) (hereafter, collectively, “regulated entities” or individually, “regulated entity”) to submit reports to FHFA when they become aware that an individual or institution and any affiliates thereof with which they are doing or have done business has committed fraud or other financial misconduct during the time period specified in the rule. The interim final rule sets forth the procedures for FHFA issuance of proposed and final suspension orders. Proposed suspension orders include an opportunity for response by the affected individual or institution and by the regulated entities. A final suspension order may be issued if FHFA determines that the covered misconduct is of a type that would be likely to cause significant financial or reputational harm to a regulated entity or

otherwise threaten the safe and sound operation of a regulated entity. Final suspension orders direct the regulated entities to cease or refrain from doing business with the individuals or institutions for a specified period of time or permanently.

DATES: The interim final rule is effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. FHFA will accept written comments on the interim final rule on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. For additional information, see **SUPPLEMENTARY INFORMATION**.

ADDRESSES: You may submit your comments on the interim final rule, identified by regulatory information number (RIN) 2590-AA60, by any of the following methods:

- E-mail: Comments to Alfred M. Pollard, General Counsel, may be sent by e-mail to RegComments@fhfa.gov. Please include “RIN 2590-AA60” in the subject line of the message.
- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments. If you submit your comment to the Federal eRulemaking Portal, please also send it by e-mail to FHFA at RegComments@fhfa.gov to ensure timely receipt by FHFA. Include the following information in the subject line of your submission: Comments/RIN 2590-AA60.
- Hand Delivered/Courier: The hand delivery address is: Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590-AA60, Federal Housing Finance Agency, Constitution Center, Eighth Floor (OGC), 400 Seventh Street, SW, Washington, DC 20024. Deliver the package at the Seventh Street entrance

Guard Desk, First Floor, on business days between 9 a.m. and 5 p.m.

- U.S. Mail, United Parcel Service, Federal Express, or Other Mail Service: The mailing address for comments is: Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590-AA60, Federal Housing Finance Agency, Constitution Center, Eighth Floor (OGC), 400 Seventh Street, SW, Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Kevin Sheehan, Assistant General Counsel, at (202) 649-3086 (not a toll-free number), Federal Housing Finance Agency, Constitution Center, Eighth Floor (OGC), 400 Seventh Street, SW, Washington, DC 20024. The telephone number for the Telecommunications Device for the Hearing Impaired is (800) 877-8339.

SUPPLEMENTARY INFORMATION:

I. Comments

FHFA invites comments on all aspects of the interim final rule, and will take all comments into consideration before issuing the final regulation. Copies of all comments will be posted without change, including any personal information you provide, such as your name, address, e-mail address, and telephone number, on the FHFA website at <http://www.fhfa.gov>. In addition, copies of all comments received will be available for examination by the public on business days between the hours of 10 a.m. and 3 p.m., at the Federal Housing Finance Agency, Constitution Center, Eighth Floor, 400 Seventh Street, SW, Washington, DC 20024. To make an appointment to inspect comments, please call the Office of General Counsel at (202) 649-3804.

II. Background and Summary of Interim Final Rule

A. Summary of Interim Final Rule

FHFA established the Suspended Counterparty Program in June, 2012 by letter to the regulated entities. The Suspended Counterparty Program requires each regulated entity to report to FHFA when it becomes aware that an individual or institution with which it is doing or has done business has committed fraud or other financial misconduct within a specified time period. FHFA reviews the reports submitted by the regulated entities to determine whether additional action is needed by FHFA to limit the risk of the regulated entities continuing to do business with the individual or institution, in order to protect the safe and sound operation of the regulated entities. In appropriate cases, FHFA will issue suspension orders directing the regulated entities to cease or refrain from doing business with the individual or institution for a specified period of time or permanently. Before issuing a final suspension order, FHFA will provide notice and an opportunity to respond to the affected individual or institution and to each of the regulated entities.

The interim final rule generally codifies the existing procedures under which the Suspended Counterparty Program operates in new 12 CFR part 1227. The specific procedures for reporting of covered misconduct and issuance of proposed and final suspension orders are further discussed below in the Section-by-Section Analysis. The Suspended Counterparty Program is intended to complement and support the risk management practices of the regulated entities. The Suspended Counterparty Program is not designed as a comprehensive system for addressing the risks presented by fraud and other misconduct. However, FHFA will continue to evaluate the scope of the Suspended Counterparty Program and will consider expanding its coverage as the agency develops more experience with the program.

B. Authority for Suspended Counterparty Program

The existing Suspended Counterparty Program involves two kinds of FHFA action. FHFA requires the regulated entities to submit reports to FHFA pursuant to specific criteria, and in appropriate cases, FHFA may issue suspension orders to the regulated entities directing them to cease or refrain from doing business with particular individuals or institutions for a specified period of time or permanently. Both kinds of agency action are authorized under provisions of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended (Safety and Soundness Act).

The reporting that is required under the Suspended Counterparty Program is within FHFA's authority under sections 1314 and 1313 of the Safety and Soundness Act. Section 1314(a) of the Safety and Soundness Act authorizes FHFA to require the regulated entities to submit regular reports on their activities and operations, as the Director considers appropriate. See 12 U.S.C. 4514(a). Section 1313(a)(2) of the Safety and Soundness Act authorizes FHFA to exercise such incidental powers as may be necessary in the supervision and regulation of each regulated entity. See 12 U.S.C. 4513(a)(2). In this case, FHFA is requiring each regulated entity to submit reports to FHFA on any individuals or institutions that are doing or have done business with the regulated entity and that meet specific criteria, in order to protect the safety and soundness of the regulated entities.

The orders that would be issued under the Suspended Counterparty Program fall within FHFA's general supervisory authority over the regulated entities, and specifically its authority under sections 1313B, 1319G, and 1313 of the Safety and Soundness Act. Section 1313B of the Safety and Soundness Act authorizes FHFA to establish standards, by regulation or guideline, for each regulated entity regarding prudential management of

risks. See 12 U.S.C. 4513b. The Director may also require by order that the regulated entities take any action that will best carry out the purposes of that section. See 12 U.S.C. 4513b(b)(2)(B)(iii). Section 1319G(a) of the Safety and Soundness Act authorizes FHFA to issue any regulations, guidelines, or orders necessary to ensure that the purposes of the Safety and Soundness Act and the charter acts are accomplished. See 12 U.S.C. 4526(a). Finally, section 1313(a)(2) of the Safety and Soundness Act authorizes FHFA to exercise such incidental powers as may be necessary in the supervision and regulation of each regulated entity. See 12 U.S.C. 4513(a)(2).

FHFA has established standards under the existing Suspended Counterparty Program to mitigate the risk that a regulated entity will be harmed by an individual or institution with which it is doing or has done business that has committed fraud or other financial misconduct during a specified time period. FHFA reviews any reports submitted by the regulated entity on individuals or institutions that meet the specified criteria, as well as any information submitted by other regulated entities, and any response that the individual or institution chooses to submit. FHFA also reviews any referrals to the Suspended Counterparty Program submitted by FHFA's Office of Inspector General. In appropriate cases, FHFA will issue suspension orders to the regulated entities directing them to cease or refrain from doing business with the individuals or institutions for a specified period of time or permanently.

C. Relationship of Suspended Counterparty Program to Other Authorities and Actions

1. Federal Government-wide suspension and debarment and other administrative sanctions

Although the Suspended Counterparty Program uses some terms and procedures that

are the same as or similar to terms and procedures used in the Federal government-wide system for suspensions and debarments, the Suspended Counterparty Program is both different and separate from administrative sanctions that may be imposed by other agencies, and some of its terms and procedures are defined differently.

The Suspended Counterparty Program was created to protect the safety and soundness of the regulated entities. A suspension order issued by FHFA under the Suspended Counterparty Program has no impact on a person's ability to do business directly with the Federal government (including FHFA itself), which is subject to a separate decision-making process. Conversely, a person that has been excluded from doing business with part or all of the Federal government may be able to continue to do business with the regulated entities. However, FHFA may consider administrative sanctions imposed by other agencies in determining whether FHFA should issue a suspension order.

2. Relationship to other FHFA authorities

The Suspended Counterparty Program is not intended to take the place of any existing authority or process that FHFA might use to address fraud or other financial misconduct by individuals or institutions that have done or are doing business with the regulated entities, or any other safety and soundness issue. If FHFA receives information under the Suspended Counterparty Program that would be more appropriately dealt with through another administrative process, nothing in part 1227 would limit FHFA from choosing to do so. For example, FHFA has specific authority to suspend or remove an entity-affiliated party in certain circumstances pursuant to section 1377(h) of the Safety and Soundness Act and subpart F of 12 CFR part 1209 (Rules of Practice and Procedure).

Other provisions of the Safety and Soundness Act allow FHFA to take a variety of different actions to ensure the safe and sound operation of the regulated entities.

3. Relationship to other action by a regulated entity

The Suspended Counterparty Program is not intended to take the place of any actions that a regulated entity might use to address safety and soundness risks presented by fraud or other financial misconduct. Each regulated entity should continue to adopt and implement prudent measures to identify areas where fraud or financial misconduct may present a risk to the regulated entity, and to take all appropriate measures to address any such risks. However, regulated entities shall abide by FHFA's determinations under the Suspended Counterparty Program.

D. Due Process Considerations

Suspension orders issued by FHFA under part 1227 are based on FHFA's supervisory authority to ensure the safe and sound operation of the regulated entities and to ensure compliance with appropriate prudential risk management standards. Because these authorities do not explicitly require hearings on the record for this type of determination, it is not necessary for FHFA to adhere to the specific procedural requirements for hearings under the Administrative Procedure Act. See 5 U.S.C. 554-558. However, because a suspension order under the Suspended Counterparty Program could have a significant impact on the regulated entities and the individual or institution that is the subject of the order, the procedures under part 1227 provide that all affected parties shall receive notice of any proposed suspension order and an opportunity to respond before issuance of any final suspension order. A final suspension order issued by FHFA would be issued only after consideration of all available information.

III. Section-by-Section Analysis

A. Purpose—§ 1227.1

Section 1227.1 of the interim final rule states that the purpose of part 1227 is to set forth the procedures FHFA follows under its Suspended Counterparty Program, the purpose of which is to protect the safety and soundness of the regulated entities. The procedures include a requirement that a regulated entity report to FHFA when it becomes aware that a person with whom it is doing or has done business has committed fraud or other financial misconduct within the specified time period in this part. The procedures set forth a process by which FHFA will issue suspension orders directing the regulated entities to cease or refrain from doing business with such persons and any affiliates thereof for a specified period of time or permanently. A suspension order is not intended to be, and may not be issued as, a form of punishment for the party affected.

B. Definitions—§ 1227.2

Section 1227.2 sets forth definitions of various terms used in part 1227. Specific definitions are discussed below where used in the applicable sections. Definitions of certain other terms used in part 1227, such as Director and FHFA, that are also used throughout other FHFA regulations, are set forth in 12 CFR 1201.1.

C. Scope of Suspension Orders—§ 1227.3

Section 1227.3 provides that a suspending official may issue a final suspension order to the regulated entities directing them to cease or refrain from engaging in any covered transactions with a particular person or any affiliates thereof for a specified period of time or permanently, pursuant to the requirements of part 1227. Section 1227.3 also provides that any actions taken under part 1227 are independent of, and have no effect on, any

other actions that may be taken by either FHFA or by a regulated entity.

A “suspending official” is defined in § 1227.2 as the Director of FHFA, or any other FHFA official with delegated authority to sign an order imposing suspension. “Person” is defined broadly in § 1227.2 to mean an individual, sole proprietor, partnership, corporation, unincorporated association, trust, joint venture, pool, syndicate, organization, or other entity. “Suspension” is defined in § 1227.2 as an action taken by a suspending official pursuant to a final suspension order that requires a regulated entity to cease or refrain from engaging in any covered transactions with a person or any affiliates thereof for a specified period of time or permanently.

A “covered transaction” is defined in § 1227.2 as a contract, agreement or financial or business relationship between a regulated entity and a person or any affiliates thereof. FHFA may provide additional guidance to the regulated entities from time to time on whether a particular kind of transaction is to be treated as a covered transaction. FHFA considered including in the rule more explicit standards for the kinds of transactions that should be treated as covered transactions. For example, the interim final rule could be revised to incorporate a definition of “lower tier covered transactions” similar to the definition used in the government-wide debarment and suspension rules. Such an approach could require the regulated entities to develop procedures and contractual requirements that will ensure that a suspended party will not continue to do business indirectly with a regulated entity through lower tier covered transactions, such as by serving as a subcontractor or service provider for a person that does business directly with the regulated entity. FHFA invites comment on whether such an approach would further the goals of the Suspended Counterparty Program and on any operational issues

such an approach may present for the regulated entities.

D. Regulated Entity Reports on Covered Misconduct—§ 1227.4

Section 1227.4(a) requires a regulated entity to submit a report to FHFA when the regulated entity becomes aware that a person or any affiliates thereof with which the regulated entity is engaging or has engaged in a covered transaction within the past three years has engaged in covered misconduct. A regulated entity is considered to be aware of covered misconduct when the regulated entity has reliable information that such misconduct has occurred.

“Covered misconduct” is defined in § 1227.2 as any conviction or administrative sanction within the past three years if the basis of such action involved fraud, embezzlement, theft, conversion, forgery, bribery, perjury, making false statements or claims, tax evasion, obstruction of justice, or any similar offense that took place in connection with a mortgage, mortgage business, mortgage securities, or other lending product.

The terms “conviction” and “administrative sanction” are defined broadly in § 1227.2 and are intended to encompass government actions that include an opportunity for a person to contest the basis of the sanction or conviction. FHFA will only consider instances of covered misconduct that are supported by factual determinations by another government entity, whether in the form of a conviction or administrative sanction. The regulated entities are not required to engage in any independent investigation of the underlying conduct. The definition of “administrative sanction” refers specifically to several different types of administrative sanctions. FHFA invites comment on whether additional types of administrative sanctions, such as enforcement actions by other

financial institution regulatory agencies, should be included in this definition.

The definition of “covered misconduct” further provides that FHFA may impute conduct among affiliates. The imputation of conduct is necessary to ensure that the regulated entities are protected from the risk of fraud and other financial misconduct by all persons that may have been involved in or otherwise responsible for the covered misconduct.

The interim final rule does not specify the internal procedures that each regulated entity must establish to ensure compliance with the reporting requirement. FHFA expects each regulated entity to have procedures in place to ensure that any relevant information will be gathered and reviewed by appropriate personnel at the regulated entity to determine whether it is necessary to submit a report on a particular person to FHFA.

Paragraphs (b) and (c) set forth the required content and timing of reports of covered misconduct submitted to FHFA.

The submission of a report under the Suspended Counterparty Program does not prevent a regulated entity from taking appropriate action to address any risks presented by the person in question. The regulated entity should not delay any appropriate risk-reduction measures pending a determination by FHFA under the Suspended Counterparty Program.

E. Proposed Suspension Order—§ 1227.5

Section 1227.5(a) makes clear that the suspending official may issue a proposed suspension based on any source of information that meets the criteria for suspending a person. Section 1227.5(b) sets forth the grounds for issuance of a proposed suspension

order. A suspending official may issue a proposed suspension order with respect to a particular person and any affiliates thereof if the suspending official determines that there is evidence that: (1) the regulated entity is engaging or has engaged in a covered transaction with the person or affiliates thereof within the past three years and the person or affiliates thereof have engaged in covered misconduct; and (2) the covered misconduct is of a type that would be likely to cause significant financial or reputational harm to a regulated entity or otherwise threaten the safe and sound operation of a regulated entity.

Paragraph (c) requires the suspending official to provide written notice to each person and any affiliates thereof for whom suspension is proposed, and to provide a copy of such notice to the regulated entity and to all of the other regulated entities. Paragraph (d) sets forth the required content of such notices. Paragraph (e) states the method of sending the notice to the affected person and any affiliates thereof. Paragraph (f) describes the required timing and content of any response from the affected person and any affiliates thereof (referred to as “respondents”).

Paragraph (g) describes the required timing and content of any response from the regulated entities. The regulated entities are required to submit any information that would indicate that suspending a particular person or affiliates thereof could reasonably be expected to have a negative financial impact or other significant adverse effect on the financial or operating performance of the regulated entity. The regulated entities are also required to submit information on any existing contractual relationships with the person or affiliates thereof for which the regulated entities might request a limitation or qualification. A regulated entity may also submit any other information that it believes would be relevant to the proposed suspension determination, such as recommendations

for alternatives to suspension that could mitigate the risks presented by engaging in covered transactions with the person or affiliates thereof, or recommendations for limitations or qualifications on the scope of the proposed suspension.

The interim final rule does not prohibit a regulated entity from taking independent action to limit its exposure to a person and any affiliate thereof that has been proposed for suspension. A regulated entity may conduct its own assessment of a person and its affiliates that is brought to the attention of the regulated entity through the Suspended Counterparty Program and take any action that it determines is appropriate. However, a regulated entity should not take any such action based solely on a notice of proposed suspension that is received from FHFA.

F. Final Suspension Order—§ 1227.6

Section 1227.6(a) sets forth the grounds for issuance of a final suspension order. A suspending official may issue a final suspension order with respect to a respondent if, based solely on the written record, the suspending official determines that there is adequate evidence that: (1) the regulated entity is engaging or has engaged in a covered transaction with the respondent within the past three years, and the respondent engaged in covered misconduct; and (2) the covered misconduct is of a type that would be likely to cause significant financial or reputational harm to a regulated entity or otherwise threaten the safe and sound operation of a regulated entity. As FHFA develops more experience with the Suspended Counterparty Program, FHFA may consider expanding the grounds on which a suspension may be issued.

Paragraph (b) provides that the written record shall include any material submitted by the respondent or by the regulated entities, as well as any other material that

was considered by the suspending official in making the final determination, including any information related to the factors in paragraph (c) discussed below. In addition, FHFA may independently obtain information relevant to the suspension determination for inclusion in the written record. Because any suspension would be based on a conviction or administrative sanction, the suspending official may proceed solely on the basis of the written record. Limiting the extent to which a person may appeal under § 1227.8 is appropriate in these circumstances because an impartial fact-finder has already determined the facts underlying the conviction or administrative sanction. However, FHFA will only proceed on this basis if the resulting conviction, administrative sanction order or other documents clearly set forth the underlying factual basis for the action.

Paragraph (c) sets forth a non-exclusive list of factors that a suspending official may consider in determining whether to issue a final suspension order where the grounds for suspension are satisfied. These factors may also provide guidance on the kinds of evidence that would be relevant to a determination on a suspension order if submitted by a respondent. Many of the factors listed are intended to focus attention on particular issues that may be relevant to assessing the likelihood that continuing to do business with a particular respondent will result in harm to the safety and soundness of a regulated entity. Other factors are intended to highlight issues that may be relevant in determining the extent to which the conduct of an individual should be attributed to the individual's employer or organization, and also the extent to which misconduct by an organization should be attributed to the owners, partners and managers of the organization.

Each regulated entity must abide by the terms of any final suspension order that the regulated entity receives. In general, a final suspension order will prohibit a regulated

entity from entering into or extending any contract, agreement, or financial or business relationship with a suspended person. A regulated entity should consider whether to terminate any existing contractual relationship with the suspended person, taking into account possible litigation risks. The regulated entities can facilitate this by including terms in contracts going forward that provide for termination if FHFA determines that a final order of suspension is appropriate.

Paragraph (d) provides that the suspending official shall make a determination on whether to issue a final suspension order with respect to the respondent within 30 calendar days of the deadline given for the respondent's response in the notice of proposed suspension order. The suspending official may extend this deadline if necessary, in which case the suspending official shall provide written notice of the extension to the respondent.

Paragraph (e) provides that the suspending official shall promptly notify the respondent, the regulated entity, and all of the other regulated entities of any determination that a final suspension order should not be issued. A determination by FHFA that a final suspension order should not be issued does not prevent a regulated entity from taking any action that it deems appropriate with respect to the person, even if the action is based on the same facts that were considered by FHFA.

Paragraph (f)(1) provides that if the suspending official makes a final determination to suspend the respondent, the suspending official shall issue a final suspension order applicable to each regulated entity. Paragraph (f)(2) sets forth the required content of final suspension orders. In most cases, the final suspension orders for each regulated entity will be identical. However, in appropriate cases, the suspending

official may tailor individual suspension orders to address issues that may be particular to one or more regulated entities. For example, if one regulated entity relies on a particular service provider for a significant number of transactions, it may be appropriate to delay or otherwise modify a suspension order to enable that regulated entity to smoothly transition to other service providers.

The suspending official generally has wide discretion to determine the appropriate scope of the final suspension order, including any limitations or qualifications that should apply. FHFA expects that the regulated entities will submit responses to proposed suspensions that describe with particularity any adverse effects that the regulated entity may experience if a respondent is suspended. The suspending official may choose to adjust the scope of the final suspension order to address such concerns, or the suspending official may determine that the safety and soundness of the regulated entities would be better served by proceeding with a final suspension order that does not include such limitations or qualifications.

Paragraph (f)(3) requires the suspending official to promptly notify the respondent of the final suspension order issued with respect to the respondent. Paragraph (f)(4) sets forth the required contents of the notice. A separate notice to the regulated entities is not required because the final suspension order itself will be directed to each regulated entity and will serve as notice of the order's terms.

Paragraph (g) provides that a final suspension order shall take effect on the date specified in the order, which shall be at least 45 calendar days after the date on which the order is signed by the suspending official. This delay in the effective date of a final

suspension order is intended to provide the respondent with an opportunity to appeal to the Director as provided in §1227.7.

G. Appeal to the Director—§ 1227.7

Section 1227.7(a) provides that a respondent who is subject to a final suspension order may submit an appeal to the Director within 30 calendar days after the date the order was signed. In cases where the Director signed the final suspension order as the suspending official, the respondent would not be able to revisit the determination by submitting an appeal under this section.

Paragraph (b) provides that if the Director does not take action on an appeal prior to the effective date of the order, the order shall take effect as if it had been affirmed by the Director, on the date specified in the order. Paragraph (c) provides that the Director's written final decision on an appeal shall be the final agency action, and if the Director does not take action on an appeal, the order shall be the final agency action.

Paragraph (d) provides that in order to fulfill the requirement to exhaust administrative remedies, a respondent must appeal a final suspension order to the Director as provided in this section prior to seeking judicial review of such order. This provision is intended to ensure that the Director has an opportunity to review each action that might later be challenged in court. If a respondent fails to appeal a final suspension order to the Director, no further appeals or challenges will be available to the respondent.

H. Posting of Final Suspension Orders—§ 1227.8

Section 1227.8 requires FHFA to publish on its website all final suspension orders issued by FHFA on the effective date of the order. Maintaining a publicly accessible list of all persons who have been suspended by FHFA will provide a readily accessible

reference tool for the regulated entities and persons who may do business with them.

FHFA will remove from the website all references to the suspension of a person and any affiliates thereof at such time as the suspension expires or is otherwise vacated.

I. Request for Reconsideration—§ 1227.9

Section 1227.9 provides that a suspended person may submit a request to the Director for reconsideration of a final suspension order at any time after the expiration of a 12-month period from the date the final suspension order took effect, but no such request may be made within 12 months of a previous request for reconsideration. The opportunity for reconsideration is limited to new information that may indicate that the suspended person's engaging in covered transactions with a regulated entity would no longer present a risk of significant financial or reputational harm or threat to the safe and sound operation of a regulated entity.

J. Exception to Final Suspension Order in Effect—§ 1227.10

Section 1227.10(a) provides that a regulated entity may request an exception from a final suspension order in effect that is applicable to the regulated entity in order to allow it to engage in a particular covered transaction with a suspended person and any affiliates thereof. A request for an exception shall state any reasons supporting the exception, as well as any steps the regulated entity plans to take to mitigate any risks presented by doing business with the suspended person. An exception for a particular covered transaction may not be requested by a suspended person or any affiliates thereof.

Paragraph (b) provides that exceptions may be approved or denied in the discretion of the suspending official, and any such decision is not subject to further appeal. Exceptions may be approved for reasons similar to any of the reasons given

above for which the suspending official might limit or qualify the scope or effect of the final suspension order itself under § 1227.6(f)(2)(iv).

Paragraph (c) provides that FHFA shall provide written notice in a timely manner to the regulated entity, the suspended person and any affiliates thereof, and the other regulated entities of any exception approved for a particular covered transaction. The notice to the other regulated entities is intended to ensure equitable treatment of all of the regulated entities.

IV. Notice and Public Participation

FHFA has determined under 5 U.S.C. 553(b)(A) and (d)(3) that a prior notice-and-comment period, and delayed effective date, are unnecessary for this interim final rule. First, in part, this rule pertains to the practices and procedures of the agency.

Further, FHFA has already implemented procedures for the Suspended Counterparty Program, pursuant to its authority to ensure that each regulated entity operates in a safe and sound manner. Because that program is already operating, it is in the interest of the regulated entities and the members of the public who do business with them to have the benefit of immediately effective procedures and standards provided in this rule.

However, because FHFA believes that public comments are valuable, it invites comments on all aspects of the interim final rule, and will consider all comments received on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]** in adopting a final regulation.

V. Consideration of Differences Between the Banks and the Enterprises

Section 1313(f) of the Safety and Soundness Act, as amended, requires the Director, when promulgating regulations relating to the Banks, to consider the differences

between Fannie Mae and Freddie Mac (collectively, the Enterprises) and the Banks with respect to: the Banks' cooperative ownership structure; mission of providing liquidity to members; affordable housing and community development mission; capital structure; joint and several liability; and any other differences the Director considers appropriate. See 12 U.S.C. 4513(f). In preparing this interim final rule, the Director considered the differences between the Banks and the Enterprises as they relate to the above factors, and determined that the Banks should not be treated differently from the Enterprises for purposes of the interim final rule. Nonetheless, FHFA requests comments on whether these factors should result in a revision of the interim final rule as it relates to the Banks.

VI. Paperwork Reduction Act

The interim final rule does not contain any information collection requirement that requires the approval of the Office of Management and Budget (OMB) under the Paperwork Reduction Act (44 U.S.C. 3501 et seq.). Therefore, FHFA has not submitted any information to OMB for review.

VII. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) requires that a regulation that has a significant economic impact on a substantial number of small entities, small businesses, or small organizations must include an initial regulatory flexibility analysis describing the regulation's impact on small entities. Such an analysis need not be undertaken if the agency has certified that the regulation will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). FHFA has considered the impact of the interim final rule under the Regulatory Flexibility Act. The General Counsel of FHFA certifies that the interim final rule is not likely to have a

significant economic impact on a substantial number of small entities because the regulation applies primarily to Fannie Mae, Freddie Mac, and the 12 Banks, which are not small entities for purposes of the Regulatory Flexibility Act.

List of Subjects in 12 CFR Part 1227

Administrative practice and procedure, Federal home loan banks, Government-sponsored enterprises, Reporting and recordkeeping requirements.

Authority and Issuance

Accordingly, for the reasons stated in the **Supplementary Information**, under the authority of 12 U.S.C. 4513, 4513b, 4514, and 4526, FHFA is amending subchapter B of Chapter XII of Title 12 of the Code of Federal Regulations by adding part 1227 to subchapter B to read as follows:

PART 1227—SUSPENDED COUNTERPARTY PROGRAM

Subpart A—General

Sec.

- 1227.1 Purpose.
- 1227.2 Definitions.
- 1227.3 Scope of suspension orders.
- 1227.4 Regulated entity reports on covered misconduct.
- 1227.5 Proposed suspension order.
- 1227.6 Final suspension order.
- 1227.7 Appeal to the Director.
- 1227.8 Posting of final suspension orders.
- 1227.9 Request for reconsideration.
- 1227.10 Exception to final suspension order in effect.

Subpart B—[Reserved]

Authority: 12 U.S.C. 4513, 4513b, 4514, 4526.

Subpart A—General

§ 1227.1 Purpose.

This part sets forth the procedures FHFA follows under its Suspended Counterparty Program, the purpose of which is to protect the safety and soundness of the regulated entities. The procedures require the regulated entities to submit reports when they become aware that a person with whom they have engaged or are engaging in a covered transaction within the past three (3) years has engaged in covered misconduct. The procedures set forth a process for FHFA to issue suspension orders directing the regulated entities to cease or refrain from engaging in covered transactions with such persons and any affiliates thereof for a specified period of time or permanently. A suspension order is not intended to be, and may not be issued as, a form of punishment for the suspended person. The procedures include options for:

- (a) Appeal of a final suspension order to the Director;
- (b) Request for reconsideration of a final suspension order after twelve (12) months have elapsed; and
- (c) Request for an exception to a final suspension order in effect in order to engage in a particular covered transaction with the suspended person.

§ 1227.2 Definitions.

For purposes of this part:

Administrative sanction means debarment or suspension imposed by any Federal agency, or any similar administrative action that has the effect of limiting the ability of a person to do business with a Federal agency, including Limited Denials of Participation, Temporary Denials of Participation, or settlements of proposed administrative sanctions if the terms of the settlement restrict the person's ability to do business with the Federal agency in question.

Affiliate means a party that either controls or is controlled by another person, whether directly or indirectly, including one or more persons that are controlled by the same third person.

Conviction means:

(1) A judgment or any other determination of guilt of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or plea; or

(2) Any other resolution that is the functional equivalent of a judgment of guilt of a criminal offense, including probation before judgment and deferred prosecution. A disposition without the participation of the court is the functional equivalent of a judgment only if it includes an admission of guilt.

Covered misconduct means:

(1) Any conviction or administrative sanction within the past three (3) years if the basis of such action involved fraud, embezzlement, theft, conversion, forgery, bribery, perjury, making false statements or claims, tax evasion, obstruction of justice, or any similar offense, in each case in connection with a mortgage, mortgage business, mortgage securities or other lending product.

(2) FHFA may impute covered misconduct among affiliates as follows:

(i) Conduct imputed from an individual to an organization. FHFA may impute the covered misconduct of any officer, director, shareholder, partner, employee, or other individual associated with an organization, to that organization when the conduct occurred in connection with the individual's performance of duties for or on behalf of that organization, or with the organization's knowledge, approval, or acquiescence. The organization's acceptance of the benefits derived from the conduct is evidence of

knowledge, approval, or acquiescence.

(ii) Conduct imputed from an organization to an individual, or between individuals. FHFA may impute the covered misconduct of any organization to an individual, or from one individual to another individual, if the individual to whom the conduct is imputed either participated in, had knowledge of, or had reason to know of the conduct.

(iii) Conduct imputed from one organization to another organization. FHFA may impute the covered misconduct of one organization to another organization when the conduct occurred in connection with a partnership, joint venture, joint application, association, or similar arrangement, or when the organization to whom the conduct is imputed has the power to direct, manage, control, or influence the activities of the organization responsible for the conduct. Acceptance of the benefits derived from the conduct is evidence of knowledge, approval, or acquiescence and hence is a basis for imputation of conduct.

Covered transaction means a contract, agreement, or financial or business relationship between a regulated entity and a person and any affiliates thereof.

Person means an individual, sole proprietor, partnership, corporation, unincorporated association, trust, joint venture, pool, syndicate, organization, or other entity.

Respondent means a person and any affiliate thereof that is the subject of a proposed or final suspension order.

Suspending official means the Director, or any other FHFA official with delegated authority to sign proposed and final suspension orders and their accompanying

notices.

Suspension means an action taken by a suspending official pursuant to a final suspension order that requires a regulated entity to cease or refrain from engaging in any covered transactions with a person and any affiliates thereof for a specified period of time or permanently.

§ 1227.3 Scope of suspension orders.

(a) General. A suspending official may issue a final suspension order to the regulated entities directing them to cease or refrain from engaging in any covered transactions with a particular person and any affiliates thereof for a specified period of time or permanently, pursuant to the requirements of this part.

(b) No effect on other actions by FHFA. Nothing in this part shall limit the authority of FHFA to pursue any other regulatory or supervisory action with respect to any regulated entity or any other person and any affiliates thereof, whether instead of or in addition to any action taken under this part.

(c) No effect on other actions by a regulated entity. Nothing in this part shall limit the authority of any regulated entity to take any action it determines appropriate to address risks from any person and any affiliates thereof with which it engages in covered transactions.

§ 1227.4 Regulated entity reports on covered misconduct.

(a) General. A regulated entity shall submit a report to FHFA when the regulated entity becomes aware that a person or any affiliates thereof with which the regulated entity is engaging or has engaged in a covered transaction within the past three (3) years has engaged in covered misconduct. A regulated entity is aware of covered misconduct

when the regulated entity has reliable information that such misconduct has occurred.

(b) Content of reports. Each report on covered misconduct shall:

(1) Include sufficient information for FHFA to identify the person or persons that are the subject of the report, as well as any affiliates thereof if such affiliates are known to the regulated entity;

(2) Describe the nature and extent of any covered transaction that the regulated entity has or had with any persons and any affiliates thereof identified in the report; and

(3) Include a description of the covered misconduct, including the date of the covered misconduct, documents evidencing the covered misconduct if in the possession of the regulated entity, and any other relevant information that the regulated entity chooses to submit.

(c) Timing of reports. (1) A regulated entity shall submit a report to FHFA on covered misconduct no later than ten (10) business days after the regulated entity becomes aware of such misconduct, even if the regulated entity lacks sufficient information to submit a complete report.

(2) A regulated entity may supplement the submission of any covered misconduct report by submitting additional relevant information to FHFA at any time.

§ 1227.5 Proposed suspension order.

(a) A suspending official may base a proposed suspension order upon evidence of covered misconduct from any of the following sources:

(1) A required report submitted by a regulated entity;

(2) A referral submitted by FHFA's Office of Inspector General; or

(3) Any other source of information.

(b) Grounds for issuance. A suspending official may issue a proposed suspension order with respect to a particular person and any affiliates thereof if the suspending official determines that there is evidence that:

(1) The regulated entity is engaging or engaged in a covered transaction with the person or any affiliates thereof within the past three (3) years and the person or any affiliates thereof has engaged in covered misconduct, which evidence may include copies of any order or other documents documenting a conviction or administrative sanction for such conduct; and

(2) The covered misconduct is of a type that would be likely to cause significant financial or reputational harm to a regulated entity or otherwise threaten the safe and sound operation of a regulated entity.

(c) Notice required. If a suspending official determines that grounds exist under paragraph (b) of this section for issuance of a proposed suspension order with respect to a particular person and any affiliates thereof, the suspending official may issue a written notice of proposed suspension to the person and any affiliates thereof, and shall provide a copy of such notice to the regulated entity and to all of the other regulated entities.

(d) Content of notice. The notice of proposed suspension shall include:

- (1) The time period during which the suspension will apply;
- (2) A statement of the suspending official's proposed suspension determination and supporting grounds;
- (3) The proposed suspension order;
- (4) Instructions on how to respond; and
- (5) The date by which any response must be received, which must be at least

thirty (30) calendar days after the date on which the notice is sent.

(e) Method of sending notice. The suspending official shall send the notice of proposed suspension to the last known street address, facsimile number, or e-mail address of the person, the person's counsel, any affiliates of the person, and the counsel for those affiliates, if known, or an agent for service of process.

(f) Response from respondent. — (1) Timing of response. Any response from the affected person and any affiliates thereof must be submitted to FHFA within the time period specified in the notice. If a response is submitted after the specified deadline, the suspending official may consider or disregard such response, in the suspending official's discretion.

(2) Content of response. The response shall identify:

(i) Any information and argument in opposition to the proposed suspension;

(ii) Any specific facts that contradict the statements contained in the notice of proposed suspension. A general denial is insufficient to raise a genuine dispute over facts material to the suspension;

(iii) All criminal and civil proceedings not included in the notice of proposed suspension that grew out of facts relevant to the bases for the proposed suspension stated in such notice;

(iv) All existing, proposed, or prior exclusions under regulations implementing Executive Order 12549 and all similar actions taken by Federal, state, or local agencies, including administrative agreements that affect only those agencies; and

(v) The names and identifying information for any affiliates of the affected person.

(g) Response from regulated entities. — (1) Timing of response. Any response from the regulated entities must be submitted to FHFA within the time period specified in the notice. If a response is submitted after the specified deadline, the suspending official may consider or disregard such response, in the suspending official's discretion.

(2) Content of response. (i) The response shall include:

(A) Any information that would indicate that suspension of the person in question could reasonably be expected to have a negative financial impact or other significant adverse effect on the financial or operating performance of the regulated entity; and

(B) Any existing contractual relationship with the person in question for which the regulated entity might request a limitation or qualification.

(ii) The response may include any other information that the regulated entity believes would be relevant to the proposed suspension determination, including but not limited to:

(A) Any information related to the factual basis for the proposed suspension;

(B) Any information about other known affiliates of the person;

(C) Recommendations for alternatives to suspension that could mitigate the risks presented by engaging in covered transactions with the respondent; and

(D) Recommendations for limitations or qualifications on the scope of the proposed suspension.

§ 1227.6 Final suspension order.

(a) Grounds for issuance. A suspending official may issue a final suspension order with respect to a respondent proposed for suspension if, based solely on the written record, the suspending official determines that there is adequate evidence that:

(1) The regulated entity is engaging or has engaged in a covered transaction within the past three (3) years with the respondent, and the respondent engaged in covered misconduct; and

(2) The covered misconduct is of a type that would be likely to cause significant financial or reputational harm to a regulated entity or otherwise threaten the safe and sound operation of a regulated entity.

(b) Written record. The written record shall include any material submitted by the respondent and any material submitted by the regulated entities, as well as any other material that was considered by the suspending official in making the final determination, including any information related to the factors in paragraph (c) of this section. FHFA may independently obtain information relevant to the suspension determination for inclusion in the written record.

(c) Factors that may be considered by the suspending official. In determining whether or not to issue a final suspension order with respect to the respondent where the grounds for suspension are satisfied, the suspending official may also consider any factors that the suspending official determines may be relevant in light of the circumstances of the particular case, including but not limited to:

(1) The actual or potential harm or impact that results or may result from the covered misconduct;

(2) The frequency of incidents or duration of the covered misconduct;

(3) Whether there is a pattern of prior covered misconduct;

(4) Whether and to what extent the respondent planned, initiated, or carried out the covered misconduct;

- (5) Whether the respondent has accepted responsibility for the covered misconduct and recognizes its seriousness;
- (6) Whether the respondent has paid or agreed to pay all criminal, civil and administrative penalties or liabilities for the covered misconduct, including any investigative or administrative costs incurred by the government, and has made or agreed to make full restitution;
- (7) Whether the covered misconduct was pervasive within the respondent's organization;
- (8) The kind of positions held by the individuals involved in the covered misconduct;
- (9) Whether the respondent's organization took appropriate corrective action or remedial measures, such as establishing ethics training and implementing programs to prevent recurrence of the covered misconduct;
- (10) Whether the respondent brought the covered misconduct to the attention of the appropriate government agency in a timely manner;
- (11) Whether the respondent has fully investigated the circumstances surrounding the covered misconduct and, if so, made the result of the investigation available to the suspending official;
- (12) Whether the respondent had effective standards of conduct and internal control systems in place at the time the covered misconduct occurred;
- (13) Whether the respondent has taken appropriate disciplinary action against the individuals responsible for the covered misconduct; or
- (14) Whether the respondent has had adequate time to eliminate the circumstances

within the organization that led to the covered misconduct.

(d) Deadline for decision. The suspending official shall make a determination on whether to issue a final suspension order with respect to the respondent within thirty (30) calendar days of the deadline given for the respondent's response in the notice of proposed suspension, unless the suspending official notifies the respondent in writing that additional time is needed.

(e) Determination not to issue final suspension order. If the suspending official determines that suspension is not appropriate with respect to the respondent, the suspending official shall provide prompt written notice of that determination to the respondent, the regulated entity, and all of the other regulated entities.

(f) Issuance of final suspension order. — (1) General. If the suspending official makes a final determination to suspend the respondent, the suspending official shall issue a final suspension order to each regulated entity regarding the respondent.

(2) Content of final suspension order. A final suspension order shall include:

(i) A statement of the suspension determination and supporting grounds, including a discussion of any relevant information submitted by the respondent or regulated entities;

(ii) Identification of each person and any affiliates thereof to which the suspension applies;

(iii) A description of the scope of the suspension, including the time period to which the suspension applies; and

(iv) A description of any limitations or qualifications that apply to the scope of the suspension, including modification of the conduct of covered transactions that may be

engaged in with the respondent.

(3) Notice to respondent required. The suspending official shall provide prompt written notice to the respondent of the final suspension order issued to the regulated entities with respect to such respondent.

(4) Content of notice. The notice of a final suspension order shall include:

(i) A statement of the suspension determination and supporting grounds, including a discussion of any relevant information submitted by the respondent; and

(ii) A copy of the final suspension order.

(g) Effective date. A final suspension order shall take effect on the date specified in the order, which shall be at least forty-five (45) calendar days after the date on which the order is signed by the suspending official.

§ 1227.7 Appeal to the Director.

(a) Opportunity to appeal. A respondent may submit an appeal to the Director within thirty (30) calendar days after the date a final suspension order has been signed. If the Director signed the final suspension order as the suspension official, the respondent has no appeal right under this section. The appeal shall be accompanied by a written brief specifically identifying the respondent's objections to the final suspension order and the supporting reasons for such objections.

(b) Decision on appeal. The Director shall issue a written final decision on an appeal of a final suspension order based on the record submitted by the suspending official, together with any material submitted with an appeal. The Director may affirm, vacate or amend the suspension, or remand to the suspending official for further proceedings, in the discretion of the Director. If the Director does not take action on an

appeal prior to the effective date of the order, the order shall take effect as if it had been affirmed by the Director, on the date specified in the order.

(c) Final agency action. The written final decision of the Director on an appeal of a final suspension order shall be the final agency action. If the Director does not take action on an appeal prior to the effective date of the order, the order shall be the final agency action.

(d) Exhaustion of administrative remedies. In order to fulfill the requirement to exhaust administrative remedies, a respondent must appeal a final suspension order to the Director as provided in this section prior to seeking judicial review of such order.

§ 1227.8 Posting of final suspension orders.

(a) Required posting. FHFA will publish on its website all final suspension orders issued by FHFA on the effective date of the order.

(b) Content of posting. Each posting on FHFA's website shall include:

(1) The full name (where available) of each suspended person and any affiliates thereof subject to the final suspension order, in alphabetical order;

(2) A description of the time period for which the suspension applies; and

(3) A copy of each final suspension order applicable to the person and any affiliates thereof.

(c) Removal of names. FHFA will remove from the website all references to the suspension of a person and any affiliates thereof at such time as the suspension expires or is otherwise vacated.

§ 1227.9 Request for reconsideration.

(a) Time period for request. A suspended person may submit a request to the

Director for reconsideration of a final suspension order at any time after the expiration of a twelve (12)-month period from the date the order took effect, but no such request may be made within twelve (12) months of a previous request for reconsideration from such person.

(b) Content of request. A request for reconsideration must be submitted in writing and state the specific grounds for relief from the final suspension order, which shall be limited to any new information that may indicate that engaging in covered transactions with a regulated entity would no longer present a risk of significant financial or reputational harm or threat to the safe and sound operation of a regulated entity.

(c) Decision on request. The Director may approve a request for reconsideration if the Director determines that engaging in covered transactions with a regulated entity is no longer likely to result in significant financial or reputational harm to a regulated entity or otherwise threaten the safe and sound operation of a regulated entity. The Director will inform the requestor of the decision on the request for reconsideration in a timely manner. A decision on a request for reconsideration shall not constitute an appealable order.

§ 1227.10 Exception to final suspension order in effect.

(a) Request for exception. A regulated entity to which a final suspension order in effect is applicable may request an exception from such order to allow it to engage in a particular covered transaction with a suspended person and any affiliates thereof. Any such request shall clearly state any reasons supporting an exception, as well as any steps the regulated entity will take to mitigate any risks presented by the exception. An exception may not be requested by a suspended person or any affiliates thereof.

(b) Decision on exception. A suspending official may approve an exception from a final suspension order in effect to permit a regulated entity to engage in a particular covered transaction with a suspended person and any affiliates thereof for reasons consistent with those for which the suspending official may limit or qualify the scope or effect of a final suspension order under § 1227.6(f)(2)(iv) of this part. The decision on a request for an exception shall not constitute an appealable order.

(c) Notice required. FHFA shall provide written notice in a timely manner to the regulated entity, the suspended person and any affiliates thereof, and the other regulated entities of any exception approved for a particular covered transaction.

Edward J. DeMarco,
Acting Director, Federal Housing Finance Agency.

October 15, 2013_____
Date

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